APPENDIX

Washington, D. C.,
October 7, 1957.

The above-entitled matter came on for hearing before the Honorable LUTHER W. YOUNGDAHL, United States District Judge, at 10:00 o'clock a.m.

Proceedings

THE DEPUTY CLERK: Vera Giovanetti vs. Georgetown University Hospital, et al., Civil Action No. 4963-53.

MR. STEMPIL: Your Honor, I appear for the plaintiff.

The plaintiff requests and prays that a voluntary non-suit be entered as to the only issue before the Court today, namely, whether or not a burr-hole operation in the circumstances was called for.

I would like the record to show the reasons for the voluntary non-suit, to-wit, because of the fact that Judge McGuire, who was not the pretrial judge, granted summary judgment to defendants on the real issues of the case which were originally set forth in the original complaint, namely, for wrongful death, negligence and malpractice, and allowed in the original pretrial order of October 11, 1956, which called for a consolidated pretrial statement and, as noted by Judge McGuire in his memorandum of February 1, 1957.

I quote from Judge McGuire's memo opinion wherein he states:

"A cause of action has been stated in paragraph 4 of the second amended complaint."

Then, at a hearing requested by the defendants, Judge McGuire granted summary judgment in favor of the de-

fendants, as noted further in his memorandum granting certain portions and striking other portions.

We attempted to remedy this by filing a motion for leave to file an amended complaint setting forth the original causes of action more articulately and clearly.

Judge Tamm denied this motion and Judge McGuire denied the plaintiff's motion when she was represented pro se.

We are, therefore, in the position, according to Judge Tamm and Judge McGuire, of being limited to the proof of the only one issue left, namely, the only issue in the case is whether or not a burr-hole operation in the circumstances was called for.

This narrow opinion changed the original cause of action filed by the plaintiff and accepted by the Court. This, obviously, is a minor and irrelevant issue and, because of this action, we do not wish to waste the time of the Court when the main issues have been ruled out.

In compliance with Judge McGuire's memorandum of February 1, 1957, the plaintiff submitted her medical statements ordered by the Court and later, in March of 1957, filed a further motion to amend the pretrial statement and/or the complaint in order that the plaintiff may include all subjects at issue contained in the medical information submitted in compliance with the said memorandum of February 1, 1957.

Judge McGuire, in ruling, stated on March 1, 1957:

> "This is a matter for the trial court. If it is sought to expand an order, the same is denied and the same is sufficiently broad in the circumstances."

Therefore, under the circumstances, faced with the fact that summary judgment has been granted on factual issues and evidentiary issues and issues of fact in evidence, it

would be a gross waste of time to try this case so bound and, in our opinion, a gross miscarriage of justice.

Therefore, too, since the motion to file an amended complaint was denied and because of the emasculation of the causes of action, this present motion under Rule 41 of the Federal Rules of Civil Procedure is respectfully presented.

MR. WELCH: If the Court please, I think counsel should be instructed that if, in any sense of the word, he wants that speech made a part of the record, that he prepare it in writing, submit it to the Court and furnish copies to opposing counsel.

This case has been filed since October, 1953. It has gone through a long and tortuous process of pleadings before the court and several changes of counsel. I don't know, but I assume Mr. Stempil filed a praecipe entering his appearance this morning.

THE COURT: I just had it handed to me this morning.

MR. WELCH: I haven't seen a copy of the praecipe entering his appearance and did not know, until we arrived here at court, that the last preceding counsel have apparently abandoned the case.

MR. STEMPIL: Your Honor, that is not correct.

MR. WELCH: We feel that, in view of the circumstances of this case at the present time, which it would take Your Honor some several minutes to review in checking back on the record, the plaintiff should be required at this stage, if they intend to dismiss their case, to dismiss it with prejudice.

This is not a situation where, as in the filing of a complaint and in due course of time, learning that there had been some changes in circumstances which may make plaintiff well advised to either change because of action or to dismiss and refile. This thing has been fought out before

the courts on almost every conceivable point in the complaint and at every conceivable procedural idea of new counsel to change the cause of action or to change the rulings of the Court and get the case back into the original stage of the original complaint.

At this late day, I think it is entirely improper, and I think it is within the discretion of the Court to permit a simple non-suit or require a dismissal with prejudice.

MR. CONNOLLY: May I be heard, if the Court please?

THE COURT: Yes, certainly.

MR. CONNOLLY: If Your Honor please, I speak on behalf of two defendants, Georgetown University Hospital and Dr. Frank A. Finnerty.

This case should be, in my opinion, dismissed for want of prosecution or, if the plaintiff wishes to dismiss, the Court should exercise its power under the rule to require dismissal with prejudice.

THE COURT: If it is dismissed for want of prosecution, it is dismissed without prejudice.

MR. CONNOLLY: I don't think so, Your Honor.

THE COURT: Yes, it would be without prejudice. I question my right to dismiss it with prejudice.

I quite agree that the case should be dismissed on the motion entirely aside from any statement that has been made by plaintiff's counsel. If plaintiff wants to come in and make a motion to dismiss, I will grant it, but I don't want any of this irrelevant matter, which I feel is entirely irrelevant as far as this motion is concerned, attached to the motion.

I quite agree if there is to be a statement filed by counsel for the plaintiff, they have a right to file any statement they wish, I suppose, but they certainly should prepare it in writing and serve a copy upon counsel, but I question my right to require dismissal with prejudice.

MR. CONNOLLY: I think Your Honor has the right under the rules. In other words, he can take a voluntary non-suit either with the consent of counsel, which we do not extend to him, or with the approval of the Court.

THE COURT: Yes.

MR. CONNOLLY: Any other dismissal is with prejudice.

THE COURT: I don't think I can dismiss a case with prejudice against his consent. I don't think I have any right to do that.

The only motion he makes before me is for the taking of a non suit.

A motion to dismiss without prejudice, that is what it amounts to, and I think that should be done and I think it should be clean, without the statement. The record speaks for itself, and I really don't see that you should be coming in here making a statement of this kind.

I think what you are doing, by making this statement, is inferentially attacking other judges of this court. I think it is entirely out of place.

If you have any grievance from any rulings, you know what your remedy is. It is not to make a statement in the record. I do not see the purpose of it. I think it is beside the point completely.

If you want to come in here clean and make a motion to dismiss, I will grant it without such a statement. If you don't want to do it, we will proceed to trial.

MR. STEMPEL: If Your Honor please, there was no indication in my mind or any desire to cast any aspersions

THE COURT: Hearing it objectively, I don't see any other purpose.

MR. STEMPEL: I withdraw that part of it

THE COURT: I think you had better withdraw your whole statement, that is my suggestion.

MR. STEMPIL: It is withdrawn and, at the same time, the motion is made cleanly for a non-suit without prejudice.

THE COURT: I will grant that motion.

MR. CONNOLLY: We would like to have it dismissed for want of prosecution, if the Court please.

THE COURT: Well, it amounts to the same thing. I will dismiss it for want of prosecution.

MR. CONNOLLY: Will the record show the plaintiff is not ready to go to trial?

MR. STEMPIL: Oh, No; we are limited to the issue because the summary judgment granted to the defendant was the meat of our action.

THE COURT: Your statement is that upon the rulings of the Court, being limited to the one issue as to whether this operation should have been performed, you are not able to prove that case?

MR. STEMPIL: That is correct.

THE COURT: And you are moving to dismiss for want of prosecution. That is what the effect of it is.

MR. STEMPIL: I don't like the words "for want of prosecution."

MR. CONNOLLY: For want of ability to proceed.

THE COURT: For want of ability to prove their case.

MR. STEMPIL: Under that one issue.

THE COURT: Under the issue that has been limited by rulings of the Court.

MR. STEMPIL: That is right. Just so it is on the record.

THE COURT: Yes.

Motion of plaintiff to dismiss cause of action on the ground of inability to prove cause of action on issues as limited by the Court is granted.

(Thereupon, the hearing was concluded.)

Order of Dismissal

This cause having come before the Court for trial this 7th day of October, 1957, and plaintiff's counsel having made an oral motion to dismiss on the ground of the inability of plaintiff to prove a cause of action on the issues as limited by the Court and said motion having been argued and discussed by both counsel for the plaintiff and defendants, it is, by the Court, this 8th day of October, 1957:

ORDERED, That the said cause be, and is hereby, dismissed.

[Filed October 8, 1957]

/s/ Luther W. Youngdahl — Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

VERA GIOVANETTI, ETC., PLAINTIFF,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., DEFENDANTS

Order

This cause came on to be heard at this term upon plaintiff's "Motion to Reinstate Cause of Action Dismissed on Motion of Plaintiff Through Error in Evidence and Misinterpretation of the Rules," and in consideration thereof and the transcript of the proceedings before this Court at the time of the dismissal of said action, and the prior order of this Court of October 8, 1957, and it appearing to the Court that this Court's prior order of October 8, 1957 and the transcript of proceedings accurately reflect the nature of the proceedings and the action taken, it is by the Court this 14 day of November, 1957:

ORDERED that plaintiff's motion be and the same is hereby denied.

[Filed Nov. 14, 1957]

/s/ Luther Youngdahl
Judge

[Certificate of Service]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,299

District Court Civil No. 4953-58

JANUARY TERM, 1958

VERA GIOVANETTI, ADMINISTRATRIX OF THE ESTATE OF HENRY G. GIOVANETTI, DECEASED, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Edgerton, Chief Judge, in Chambers.

Order

Upon consideration of appellant's motion for leave to file a cash cost bond in the sum of $250.00, and it appearing that no objections have been filed, it is

ORDERED that appellant be, and she is hereby, allowed to to file in the District Court a cash cost bond in the amount of $250.00 on or before March 15, 1958.

Dated: March 10, 1958.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,299

APRIL TERM, 1958

VERA GIOVANETTI, ADMINISTRATRIX OF THE ESTATE OF HENRY G. GIOVANETTI, DECEASED, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Wilbur K. Miller, Danaher, and Burger, Circuit Judges, in Chambers.

Order

On consideration of the motion of appellees Georgetown University Hospital and Frank A. Finnerty to dismiss appeal or to the judgment of the District Court, it is

ORDERED by the court that the motion be, and it is hereby, denied.

Per Curiam.

Dated: July 11, 1958

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,299

APRIL TERM, 1958

Filed July 11, 1958, Joseph W. Stewart, Clerk.

VERA GIOVANETTI, ADMINISTRATRIX OF THE ESTATE OF HENRY G. GIOVANETTI, DECEASED, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Wilbur K. Miller, Danaher, and Burger, Circuit Judges, in Chambers.

Order

On consideration of the motion of appellee John P. Gallagher, to dismiss appeal or to affirm the judgment of the District Court, it is

ORDERED by the court that the motion be, and it is hereby, denied.

Dated: July 11, 1958. Per Curiam.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,299

APRIL TERM, 1958

Filed July 11, 1958, Joseph W. Stewart, Clerk.

VERA GIOVANETTI, ADMINISTRATRIX OF THE ESTATE OF HENRY G. GIOVANETTI, DECEASED, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Wilbur K. Miller, Danaher, and Burger, Circuit Judges, in Chambers.

Order

On consideration of the motion of appellees Georgetown University Hospital and Frank A. Finnerty for an order directing the clerk to accept brief for filing, and it appearing that said brief has been lodged with the clerk, and it further appearing that said brief is in support of said appellees' motion to dismiss appeal, it is

ORDERED by the Court that the clerk be, and he is hereby, directed to file the brief of appellees Georgetown University Hospital and Frank A. Finnerty in this case, and treating said brief as a motion to dismiss, the motion to dismiss is denied, and it is

FURTHER ORDERED that the time for filing appellees' brief be, and it is hereby, extended to and including August 5, 1958.

Per Curiam.

Dated: July 11, 1958.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,299

SEPTEMBER TERM, 1958

Filed October 6, 1958, Joseph W. Stewart, Clerk.

VERA GIOVANETTI, ADMINISTRATRIX OF THE ESTATE OF HENRY G. GIOVANETTI, DECEASED, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Wilbur K. Miller, Washington and Burger, Circuit Judges.

Order

This cause came on for consideration on the transcript of the record from the District Court, and was argued by counsel.

After consideration whereof, it is ORDERED by the court that this cause be, and it is hereby, remanded to the District Court for the purpose of clarifying its orders of October 8, 1957, and November 14, 1957, in respect of: (1) which provision or provisions of the Federal Rules of Civil Procedure form the basis thereof; and (2) whether its orders are with or without prejudice, as that expression is used in the Federal Rules of Civil Procedure.

If clarification is made by a memorandum of the District Court, this appeal will be reinstated by this court on motion of appellant filed within 10 days after the filing of such memorandum. If clarification is made by an order of the District Cour tamending either or both of the orders of October 8, 1957, and November 14, 1957, any party aggrieved thereby may take an appeal therefrom.

Per Curiam.

Dated: October 6, 1958.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

VERA GIOVANETTI, ETC., PLAINTIFF,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., DEFENDANTS

CA. 4953-53

Memorandum

Upon remand of this case on October 6, 1958, the Court carefully reconsidered and studied the transcript of October 7, 1957.

Counsel for plaintiff made no objection to having the case set for trial on October 7, 1957, and appeared in Court apparently ready for trial on that date. When the case was called for trial, plaintiff's counsel made a statement to the Court that he could not prove a cause of action if he were to be restricted to those issues remaining after the pre-trial of Judge Kirkland on October 11, 1956 and the partial summary adjudication of Judge McGuire on February 27, 1957. Accordingly, counsel for the plaintiff moved for a dismissal without prejudice, counsel for defendants objected to a dismissal without prejudice and requested a dismissal with prejudice for want of prosecution.

In view of the time the case had been pending, and in view of the numerous matters that had been litigated in this case prior to October 7, 1957 and the important rights acquired by the defendants as a result of the progress of this pre-trial litigation, and in view of the statement made by counsel for plaintiff that he could not prove a case on the issues so limited, it is the opinion of this court that the case should be dismissed with prejudice for want of prosecution.

Walker v. *Spencer* 123 F2d 347 10th Circ. 1941: *Lynch* v. *National Bondholders Corporation* 2 FRD 376 (1942); *Rollison* v. *Wash. Nat'l Insurance Co.* 176 F2d 364 (4th Cir. 1949); Rule 41(b) of the Fed. Rules of Civil Procedure; 28 USC following sec. 2072.

An order to that effect has this day been rendered.

/s/ Luther W. Youngdahl

Judge

October 22, 1958.

CA. 4953-53

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

VERA GIOVANETTI, ETC., PLAINTIFF,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL.

Order

This cause having been remanded from the U.S. Court of Appeals for the District of Columbia Circuit for the purpose of clarifying the orders of Oct. 8, 1947 and November 14, 1957, pertaining to this cause, it is by the court this 22 day of October, 1958

ORDERED: That the cause be dismissed with prejudice for want of prosecution in accordance with Rule 41(b) of the Fed. Rules of Civil Procedure.

Luther W. Youngdahl
Judge.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,299

SEPTEMBER TERM, 1958

Filed December 15, 1958, Joseph W. Stewart, Clerk.

VERA GIOVANETTI, ADMINISTRATRIX OF THE ESTATE OF HENRY G. GIOVANETTI, DECEASED, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Wilbur K. Miller, Washington and Burger, Circuit Judges, in Chambers.

Order

Upon consideration of appellant's motion to reinstate this appeal, it is

ORDERED by the court that the aforesaid motion is denied.

Per Curiam.

Dated: December 15, 1958.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,844

SEPTEMBER TERM, 1958

VERA GIOVANETTI, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Prettyman, Chief Judge, in Chambers.

Order

Upon consideration of appellant's motion for leave to file a brief, time having expired, and to allow the brief in case No. 14,299, *Giovanetti* v. *Georgetown University Hospital*, et al., to be accepted as a brief in this case and for leave to file an additional brief, and it appearing that no objections have been filed, it is

ORDERED that the appellant's brief previously filed in case No. 14,299, is deemed to be appellant's brief in this case and that appellant is allowed to and including January 31, 1959 to file a supplemental brief in this case.

Dated: January 30, 1959.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,844

SEPTEMBER TERM, 1958

District Court Civil Action No. 4953-53

VERA GIOVANETTI, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Wilbur K. Miller, Washington and Burger, Circuit Judges, in Chambers.

Order

Upon consideration of the motion of appellees Georgetown University Hospital and Frank A. Finnerty, M.D., to reconsider the order of January 30, 1959, allowing appellant an extension of time to file her brief and of their motion to dismiss this appeal and of appellant's motion for further extension of time to file additional brief, time having expired, and it appearing that appellant has failed to comply with Rule 15 and 16(b) of this court and that our review of this case indicates that no injury will be done by dismissal of the appeal, c/f/ *Smith* v. *Pollin*, 89 U.S. App. D.C. 407, 190 F2d 657, *cert denied*, 342 U.S. 878, rehearing denied, 342 U.S. 907 (1951); and we find that the trial judge did not abuse his discretion in dismissing for want of prosecution, it is

ORDERED by the court that this appeal is dismissed and that appellees shall recover from appellant their taxable costs on appeal and have execution therefor.

Per Curiam.

Dated: March 23, 1959.